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THE AMERICAN VIEW OF NEUTRALITY.

THE rights and duties of neutrals very early engaged the attention of the United States. The infant nation had an ever-present struggle on its hands in its effort to curb, with indifferent success, the predatory attacks on American commerce inspired by conflicting European ambitions. Wharton points out that from the necessities of the case we have always been the peculiar champions of the rights of neutrals.

The usages of neutrality depend for their binding force upon their general adoption by the community of nations. But whilst it is true that the measure of a neutral's obligation in an extra-territorial sense can only be fixed by the law of nations, in the United States municipal law can and does regulate the attitude of the Government and its citizens.

Our policy began to take definite shape in the year 1793. In that year Citizen Genet landed in this country with a liberal supply of blank commissions. Our treaty of 1778 had secured to France two special privileges in American ports. (1) Admission for her privateers with their prizes. (2) Admission for her public ships of war, in case of urgent necessity, to victual, repair, etc. These privileges, while exceptional, were not exclusive. Similar concessions are found in the treaty with Prussia of 1785. Upon the outbreak of hostilities Washington had issued a proclamation of neutrality. Genet, however, asserted his right of arming in our ports and of enlisting our citizens, insisting we had no right to restrain him or punish them. Presently the crisis became so acute that, having in mind the

conduct of the French Minister, the Cabinet adopted rules as to the equipment of vessels in the ports of the United States by belligerent powers and Hamilton sent out a Treasury circular to collectors of customs setting forth that "the original arming and equipping of vessels in the ports of the United States by any of the belligerent powers for military services, offensive or inoffensive is unlawful." Jefferson as Secretary of State, not deeming the privileges demanded by Genet warranted by the terms of the treaty and regarding them as inconsistent with the law of nations, complained to our Minister to France, making the point:

> "That if United States have a right to refuse the permission to arm vessels and raise men within their ports and territories they are bound by the laws of neutrality to exercise that right and to prohibit such armaments and enlistments."

Genet characterized these views as "diplomatic subtleties" and "aphorisms of Vattel" but France ultimately disavowed the acts of her Minister.

The immediate result of this attempt to exercise belligerent privileges, inconsistent with neutrality, was the passing by Congress in the following year of the law of June 5, 1794, forbidding within the territory or jurisdiction of the United States the acceptance and exercise of a commission, the enlistment of men, the fitting out and arming of vessels and the setting on foot of military expeditions in the service of any foreign prince or state with which the United States was at peace. Under this law one Guinet was indicted and convicted in the Pennsylvania district of the United States Circuit Court for being knowingly concerned in furnishing, fitting out and arming Les Jumeaux with intent that she should be employed in the service of the Republic of France against Great Britain. The Supreme Court in United States *v.* Guinet [1] affirmed this conviction in April, 1795. A supplementary act was passed on June 14, 1797. Thereafter for twenty years there was no change in our neutrality laws. In a special message to Congress in December, 1816, President Madison stated:

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[1] 2 Dall. 321.

> "It is found that the existing laws have not the efficacy necessary to prevent violations of the obligations of the United States as a nation at peace toward belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States."

Congress responded by passing the act of March 3, 1817, "an act more effectually to preserve the neutral relations of the United States." It was of this act that Henry Adams in his History of the United States, says:

> "Nearly fifty years were to pass before the people of the United States learned to realize the full importance of this act which laid the foundation for all subsequent measures taken by the United States and Great Britain for observing neutrality in their relations with warring countries."

The following year the comprehensive statute of April 20, 1818, which became embodied in the revised statutes and is now part of our Penal Code, was enacted. With the supplemental law of March 10, 1838, it defines all the prohibited acts on the part of private persons under our municipal neutrality laws. What those acts are was set forth by the President in his usual conventional proclamation of neutrality on August 4th last a few days after the outbreak of hostilities in Europe, to wit:

1. Accepting and exercising a commission to serve either of the said belligerents by land or by sea against the other belligerent.

2. Enlisting or entering into the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

3. Hiring or retaining another person to enlist or enter himself in the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

4. Hiring another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted as aforesaid.

5. Hiring another person to go beyond the limits of the United States with intent to be entered into service as aforesaid.

6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.

7. Retaining another person to go beyond the limits of the United States with intent to be entered into service as aforesaid. (But the said act is not to be construed to extend to a citizen or subject of either belligerent who, being transiently within the United States, shall, on board of any vessel of war, which, at the time of its arrival within the United States, was fitted and equipped as such vessel of war, enlist or enter himself or hire or retain another subject or citizen of the same belligerent, who is transiently within the United States, to enlist or enter himself to serve such belligerent on board such vessel of war, if the United States shall then be at peace with such belligerent.)

8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents.

9. Issuing or delivering a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

10. Increasing or augmenting, or procuring to be increased or augmented, or knowingly being concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of either of the said belligerents, or belonging to the subjects of either, by adding to the number of guns of such vessels, or by changing those on board of her for guns of a larger calibre, or by the addition thereto of any equipment solely applicable to war.

11. Beginning or setting on foot or providing or preparing the means for any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents.

The necessity for such legislation was urgent in the early

days of the Republic as the numerous prosecutions under it bear witness. The Canadian rebellion of 1837 and the lively interest in it taken by the citizens of New York and Vermont occasioned President Van Buren much concern and was the text of several proclamations based on our neutrality statutes.

During the Crimean War the British Parliament passed an act to provide for the enlistment of foreigners in the British service. Presently recruitments began in the United States prosecuted, it was charged, upon a systematic plan devised by official authority. Persons were engaged within the United States to proceed to Halifax in Nova Scotia and there enlist in the service of Great Britain. It was said that this practice was going on extensively with little or no disguise and legal steps were taken to punish the guilty parties and put an end to acts infringing the municipal law and derogatory to our sovereignty. Diplomatic representations were addressed to the British Government. All this was reviewed by President Pierce in his annual message in 1855 who frankly stated that:

> "Recruit rendezvous had been opened in our principal cities and depots for the reception of recruits established on our frontier, and the whole business conducted under the supervision and by the regular co-operation of British officers, civil and military."

The Fenian raids in the 60's formed the subject of diplomatic correspondence between the United States and Great Britain in which our Government maintained that it had performed its full duties as a neutral in repressing attempts to violate the neutrality laws.

But the chief scope of these laws in more recent years has been in dealing with attempts to aid insurrections and rebellions to the South of us, especially in Cuba. One of the latest prosecutions was the trial and conviction in 1895 of Captain Wiborg of the Danish Steamer Horsa at Philadelphia, for "setting on foot and providing and preparing the means for a certain military expedition and enterprise to be carried on from thence against the territory and dominion of a foreign prince, to wit, against the island of Cuba." [2]

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[2] 163 U. S. 632.

The Statute of 1818, then, as amended by the law of 1838 constitutes our sole *municipal* Neutrality Code regulating the conduct of private persons. We must turn then to the law of nations (with which municipal law is not to be confused) for any other limitations upon their conduct. Obviously such a code of law cannot be formulated with the precision attainable by municipal law. There have been various attempts to perfect a common agreement, conspicuously the Congress of Paris of 1856 and the International Naval Conference of London of 1909. The chief results of the Congress of Paris were declarations that privateering should be abolished; that a neutral flag should cover enemy's goods, excepting contraband of war; that neutral goods excepting contraband of war are not liable to capture under the enemy's flag; and that blockades, in order to be binding must be effective. The United States did not adhere to the principles set forth in this declaration. The London Convention has not been ratified by the signatory powers and has no real binding force. President Wilson has recently aptly said that the processes of international law are the sole processes by which the opinion of the world works its will. In a word, there is no world unanimity of opinion as to the rights of neutrals.

The Department of State on October 15 last, impelled thereto no doubt by a flood of inquiries, issued a circular on "Neutrality and Trade in Contraband" for the information of the public which summarizes with the force of official authority neutral rights of citizens under the law of nations:

> "In the first place it should be understood that, generally speaking, a citizen of the United States can sell to a belligerent government or its agent any article of commerce which he pleases. He is not prohibited from doing this by any rule of international law, by any treaty provisions, or by any statute of the United States. It makes no difference whether the articles sold are exclusively for war purposes, such as firearms, explosives, etc., or are foodstuffs, clothing, horses, etc., for the use of the army or navy of the belligerent.
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> "Furthermore, a neutral government is not compelled by international law, by treaty, or by statute to prevent these

sales to a belligerent. Such sales, therefore, by American citizens do not in the least affect the neutrality of the United States.

"It is true that such articles as those mentioned are considered contraband and are, outside the territorial jurisdiction of a neutral nation, subject to seizure by an enemy of the purchasing government, but it is the enemy's duty to prevent the articles reaching their destination, not the duty of the nation whose citizens have sold them. If the enemy of the purchasing nation happens for the time to be unable to do this that is for him one of the misfortunes of war; the inability, however, imposes on the neutral government no obligation to prevent the sale."

The extent to which American trade was conducted during the Crimean War is best seen by this extract from President Pierce's message of 1855:

"The laws of the United States do not forbid their citizens to sell to either of the belligerent powers articles contraband of war or take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property or person to some of the hazards of war, his acts do not involve any breach of national neutrality nor of themselves implicate the Government. Thus, during the progress of the present war in Europe, our citizens have, without national responsibility therefor, sold gunpowder and arms to all buyers, regardless of the destination of those articles. Our merchantmen have been, and still continue to be, largely employed by Great Britain and by France in transporting troops, provisions, and munitions of war to the principal seat of military operations and in bringing home their sick and wounded soldiers; but such use of our mercantile marine is not interdicted either by the international or by our municipal law, and therefore does not compromit our neutral relations with Russia."

In 1854 Secretary Marcy advised one of the Central American ministers:

"The mere exportation of arms and munitions of war from the United States to a belligerent country has never however, been considered as an offense against the act of Con-

> gress of the 20th of April, 1818. All belligerents enjoy this right equally and a privilege which is open to all cannot justly be complained of by any one party."

In the following year the Secretary in a dispatch to Mr. Buchanan, then Minister to Great Britain, stated:

> "It is certainly a novel doctrine of international law that traffic by citizens or subjects of a neutral power with belligerents, though it should be in arms, ammunition, and warlike stores, compromits the neutrality of that power."

There is one limitation imposed by our municipal law upon this doctrine which should be mentioned. Recognizing the need of legislation to check the unrestricted shipment of arms over our southern borders, Congress, on March 14, 1912, passed a joint resolution which empowers the President to recognize the existence of conditions under which it shall be unlawful to export any arms or munitions of war to "any *American* country where conditions of domestic violence exist."

The status of commercial loans by the citizens or subjects of a neutral power to a belligerent power has been the subject of recent discussion. Hall in his work on International Law takes the position that money is in theory and in fact an article of commerce in the fullest sense of the word. Both he and Wharton champion the view that the lending of money by neutral subjects to a belligerent government is not a violation of neutrality. The authorities will disclose numerous precedents for such loans. During the South African war loans were negotiated for the British Government in the United States and in the war between Russia and Japan loans were likewise effected in this country. Any real ban upon them would undoubtedly mark a departure from our policy in the past.

The lack of precedent holding that there is no obligation on the part of our Government to prevent citizens from making commercial loans to a belligerent power presupposes, however, an *independent* belligerent power. There is, therefore, an important distinction to be made in the case of loans made to further insurrections in states or countries whose independence had not been recognized by our Government.

In 1895 inquiry was made of the State Department whether a national bank or its officers would be criminally prosecuted under the neutrality laws of the United States because the bank had knowingly made itself a depository of funds contributed by sympathizers in this country in support of the then prevailing Cuban insurrection. Secretary Olney responded to this inquiry that it was "a question as to which opinions may differ and which can be satisfactorily settled only by the adjudication of the proper court. Should a bank engage in such a transaction and, as you suggest, publish its acceptance of such a trust to the world it would be my duty to call upon the Department of Justice to test the question whether or not the proceeding was a crime against the United States." It is evident from the extract quoted from the Supreme Court decision in Kennett *v.* Chambers [3] that the Secretary based his doubts upon the fact that Cuba was a dependency of Spain with which country we were then at peace. In the Kennett case it was held that a suit could not be maintained on the loan made expressly to affect a belligerent object. The particular facts under review related to a contract made in Cincinnati, after Texas declared itself independent but *before* its independence was acknowledged by the United States, under which money was furnished to a general in the Texan army to enable him to raise and equip troops to be employed against Mexico. The opinion emphasizes the importance attached to the fact that at the time the contract was made the independence of Texas had not been recognized by the United States and the court says:

> "It is not necessary, in the case before us, to decide how far the judicial tribunals of the United States would enforce a contract like this, when two states, acknowledged to be independent, were at war, and this country neutral. It is a sufficient answer to the argument to say that the question whether Texas had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent state, the judicial tribunals of the country were bound to consider the old

[3] 14 How. 38.

> order of things as having continued, and to regard Texas as a part of the Mexican territory."

It is obvious that there is a sharp line of demarkation between the conduct of a neutral state and its public officials and the conduct of private citizens or subjects of that state. The law of nations imposes upon a neutral government the obligation not to sell a belligerent ships or munitions of war, even when the sale is pursuant to an established policy of getting rid of superfluous or obsolete equipment. During the Franco-German war the Secretary of War disposed of certain arms and stores pursuant to an act of Congress passed in 1868 to persons who turned out to be agents of France. A Senate report upon this transaction denied that the agency was known or suspected by our Government at the time the sales were made and also took the position that, if the agency actually existed, the sale was lawful "in pursuance of a national policy adopted by us prior to the commencement of hostilities." This attitude is now generally recognized as untenable and Hall says in connection with this transaction:

> "The vendor of munitions of war in large quantities during the existence of hostilities knows perfectly well that the purchaser must intend them for the use of one of the belligerents, and a neutral government is too strictly bound to hold aloof from the quarrel to be allowed to seek safety in the quibble that the precise destination of the articles bought has not been disclosed."

And the rule of strict accountability of a neutral state extends to the conduct of the public officials of that state. In 1816 the postmaster at Baltimore was alleged to have given a toast reflecting on the French Government. The Duke of Richelieu, Minister of Foreign Affairs, demanded an apology and the dismissal of the official. This was refused by President Monroe who insisted that in matters of this character the Government of the United States exercised no control. The French Government in turn declined to "preserve any public agent in the town where His Majesty had been publicly insulted." But this view of the lack of control over the utterances of our public officials

has long since been abandoned. There have been numerous instances of late years where Government officials, especially army and navy officers, have been held to a strict accountability for unneutral and offensive speech.

It is a matter of special historical interest at this time to recall, in connection with our traditional policy regarding neutral rights, that the treaty with Prussia of 1785, which bore the signatures of Benjamin Franklin, Thomas Jefferson and John Adams, contains the first official recognition of the doctrine that free vessels make free goods. Article 12 provided:

> "If one of the contracting parties should be engaged in war with any other Power, the free intercourse and commerce of the subjects or citizens of the party remaining neutral with the belligerent Powers shall not be interrupted. On the contrary, in that case, as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other; and the same freedom shall be extended to persons who shall be on board a free vessel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy."

This provision was revived by the treaty of 1828 and is today still in force as a part of the treaty stipulations between the German Empire and the United States. When Grant came to issue his proclamation of neutrality in the Franco-German War, allusion was made to this treaty and it was recited:

> "that it has been officially communicated to the Government of the United States by the envoy extraordinary and minister plenipotentiary of the North German Confederation at Washington that private property on the high seas will be exempted from seizure by the ships of His Majesty the King of Prussia, without regard to reciprocity.
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> "And I do further declare and proclaim that it has been officially communicated to the Government of the United States by the envoy extraordinary and minister plenipotentiary of His Majesty the Emperor of the French at Wash-

> ington that orders have been given that in the conduct of the war the commanders of the French observe toward neutral powers the rules of international law and that they shall strictly adhere to the principles set forth in the declaration of the congress of Paris of the 16th of April, 1856."

President McKinley in his annual message in 1898 suggested that the executive be authorized to correspond with the principal maritime powers with a view to incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea as contraband of war from capture or destruction by belligerent powers. President Roosevelt cordially renewed this recommendation in his message of December 7, 1903, saying that it was an anachronism that private property should be respected on land and not at sea. Nothing came of these suggestions.

The recent passage by Congress of the new ship registry law permitting under certain conditions American registration of foreign vessels, has, not unnaturally, added to the hazards and vexations of neutral shipping at this time. Some hint of the British attitude was seen in the seizure of Standard Oil tank ships with cargoes of illuminating oil consigned to Denmark—apparently on the theory that such oil was conditional contraband ultimately destined for the enemy's country. Their subsequent release averted diplomatic controversy but the principle that contraband goods protected by a neutral flag are safe from molestation in the absence of suspicious circumstances as to the port of ultimate destination, is very far from being generally recognized. Indeed the rights of neutrals upon the world's greatest highway have never perhaps been so completely enveloped in the mists of uncertainty as now. The status of the whole neutrality code is perilously near chaos. The one thing reasonably certain is that the conflict of diverging views will force further international conference at no distant date after peace shall once have been declared. When that time comes, our attitude as a nation will no doubt be in harmony with the declaration of the Supreme Court in The Buena Ventura.[4]

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[4] 175 U. S. 384.

"It is, as we think, historically accurate to say that this Government has always been, in its views, among the most advanced of the Governments of the world in favor of mitigating, as to all non-combatants, the hardships and horrors of war. To accomplish that object it has always advocated those rules which would in most cases do away with the right to capture the private property of an enemy on the high seas."

Albert H. Washburn.

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